



IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

SO ORDERED.

SIGNED this 01 day of September, 2004.

ROBERT TERRY COLBERT,

DEBTOR.

Dale L. Somers

Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

**ORDER INDICATING COURT'S WILLINGNESS TO APPROVE DEBTOR'S
WAIVER OF DISCHARGE, AND PROPOSED SETTLEMENT AND
ASSIGNMENT OF CLAIM BETWEEN CHAPTER 7 TRUSTEE, DEBTOR,
AND DEBTOR'S WIFE, BUT SUBJECT TO CONDITION
THAT DEBTOR MUST AFFIRMATIVELY ACCEPT**

This matter is before the Court on the Debtor's motion for an order approving a waiver of his discharge, and the Chapter 7 Trustee's application for approval of a settlement and the assignment of a claim belonging to the bankruptcy estate. Each of these matters is contingent on the Court's approval of the other. The Debtor appears by counsel Carl R. Clark, John P. Barelli, and Ian H. Taylor. Trustee Steven R. Rebein appears pro se. Interested parties Steven G. Bolton and Steven G. Bolton, P.A. (collectively "Bolton"), appear by counsel Richmond M. Enochs and Thomas M. Franklin. The Debtor's proposed waiver of discharge would resolve Adversary Proceeding No. 03-6110, brought by the United States Trustee pursuant to 11 U.S.C.A. § 727(a), objecting to the Debtor's discharge. The U.S. Trustee appears by attorneys William F. Schantz and Richard A.

Wieland. The Court has reviewed the relevant materials and considered the arguments of counsel, and has concluded that entry of this order is necessary before the Court will grant the motion and the application.

Both these matters arise from Bolton's legal representation of the Debtor in this bankruptcy case. Based on a variety of problems with the bankruptcy petition, schedules, and statement of financial affairs that Bolton filed for the Debtor on the last day of 2002 to commence the case, the U.S. Trustee filed a complaint in July 2003 objecting to the Debtor's discharge. By September 2003, Bolton moved to withdraw from representing the Debtor in both the main case and the adversary proceeding, indicating that the Debtor was seeking other counsel and that further differences had developed between him and the Debtor.

Eventually, joined by his non-debtor wife, the Debtor sued Bolton for legal malpractice, asserting a number of claims and seeking substantial damages. They also included the U.S. Trustee and the Debtor's bankruptcy estate as plaintiffs in that suit. They filed the suit in state court, but Bolton removed it to federal district court, where it is now pending.

At a hearing on August 20, 2004, the Debtor's counsel indicated that the pendency of the U.S. Trustee's complaint was interfering with the Debtor's ability to pursue his occupation as an insurance agent. The Debtor also wishes to avoid the continuing expense of defending against the U.S. Trustee's adversary complaint. Under the proposed settlement with Trustee Rebein, the Debtor's bankruptcy estate is giving the Debtor the

right to prosecute its interests in the malpractice suit and will receive fifty percent of any net recovery obtained on behalf of the estate or the Debtor. The estate will assert no interest in the Debtor's wife's interest in the malpractice suit. The attorneys representing the Debtor and his wife in the suit will also represent the estate, and their contingent fee and expenses will be paid from any recovery before the estate's share is calculated.

Bolton object to the motion and application because: (1) objections to discharge are raised to protect the integrity of the bankruptcy process and full disclosure is required before they can appropriately be settled; and (2) they believe that the Debtor can successfully defend against the U.S. Trustee's objection to his discharge. The first concern is misplaced here because the Debtor will not receive a discharge if the Court approves the waiver of discharge and the settlement with the bankruptcy estate; the cited case law addresses settlements under which the debtors would give money or other consideration in order to receive partial or total discharges.¹ The Court is more sympathetic, though, to the second concern.

The only interest that Bolton would seem to have in the waiver of discharge and settlement with the Chapter 7 Trustee is the potential impact those matters might have on the malpractice claim against them. If the Debtor could still obtain a discharge in his bankruptcy case despite the allegedly faulty legal representation, the damages he, his wife, and his bankruptcy estate could claim resulted from the alleged malpractice could be

¹*See, e.g., In re Levine*, 287 B.R. 683, 688-703 (Bankr. E.D. Mich. 2002) (concluding § 727(a) complaint cannot be settled by allowing debtor to receive discharge in exchange for consideration).

significantly reduced, although perhaps not completely eliminated. But the Court does not see this as a reason to force the Debtor to continue to litigate with the Trustee and the U.S. Trustee before this Court. Instead, the solution is to answer now a question that would otherwise likely arise in the future in the malpractice suit: if the waiver and settlement are approved, may Bolton nevertheless include as a defense in the malpractice suit a claim that the Debtor would have defeated the U.S. Trustee's objection to his discharge had he continued to defend against it? That is, that the loss of his discharge resulted from giving up his defense, not from Bolton's acts or omissions?

To avoid any later dispute on this point, the Court believes it is appropriate to condition approval of the waiver and settlement on the Debtor's agreement that he cannot rely on the waiver of his discharge to establish that Bolton's acts or omissions caused him to lose the discharge. Instead, in the malpractice lawsuit, Bolton will be free to try to prove that the Debtor would have obtained a discharge despite any deficiencies in the legal representation Bolton provided. The Debtor, of course, will be free to try to prove that the U.S. Trustee would have prevailed in Adversary No. 03-6110; he will simply be precluded from relying on the waiver to establish that fact.

Consequently, the Debtor is hereby ordered to file a pleading on or before September 17, 2004, stating whether he still wants the Court to approve the waiver and settlement with this added condition.

IT IS SO ORDERED.

Dated this 31st day of August, 2004.

DALE L. SOMERS
BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the above **ORDER INDICATING COURT'S WILLINGNESS TO APPROVE DEBTOR'S WAIVER OF DISCHARGE, AND PROPOSED SETTLEMENT AND ASSIGNMENT OF CLAIM BETWEEN CHAPTER 7 TRUSTEE, DEBTOR, AND DEBTOR'S WIFE, BUT SUBJECT TO CONDITION THAT DEBTOR MUST AFFIRMATIVELY ACCEPT** were mailed via regular U.S. mail, postage prepaid, on the 31st day of August, 2004, to the following:

Carl R. Clark
Lentz & Clark
PO Box 12167
Overland Park, KS 66282
Attorney for Debtor

John P. Barelli
Barelli Law
6400 Glenwood, Ste. 210
Overland Park, KS 66202-4025
Attorney for Debtor

Ian H. Taylor
Knopp & Bannister, P.A.
620 Humboldt
Manhattan, KS 66502
Attorney for Debtor

Richard M. Enochs
Wallace Saunders Austin Brown Enochs
PO Box 12290
Overland Park, KS 66282
Attorney for Steven G. Bolton and Steven G. Bolton, P.A.

Thomas M. Franklin
Attorney at Law
300 United Missouri Bank Bldg.
1310 Carondelet Dr.
Kansas City, MO 64114
Attorney for Steven G. Bolton and Steven G. Bolton, P.A.

Steven R. Rebein
Grimes & Rebein, L.C.
15301 W. 87th Street Parkway, #200
Lenexa, KS 55219
Chapter 7 Trustee

Vicki Jacobsen
Judicial Assistant